Table 2. New local-into-local markets and new satellite carriers

Date	Notice from	To	Contents
90 days prior to commencement of local-into-local service	Satellite carrier	• Commission • All local television stations	• Name of carrier • Name & title of person designated to receive notifications • Address of the satellite carrier and the person designated to receive notifications (if different) • Identification of the market (DMA) where service is provided • The call signs of the broadcast television stations the carrier is carrying and/or plans to carry in the market • The location of the carrier's designated local receive facility and, if necessary, the alternate location proposed by the satellite carrier for reception of local stations' signals • Notice to the station, if necessary, that it fails to deliver a good quality signal to the designated local receive facility of the carrier, along with the required signal strength measurement test data and test procedure information.
30 days after receipt of notice from satellite carrier	Local television stations	Satellite carriers from which notices have been received	Retransmission consent/carry-one, carry-all election (request for carriage)

In the 60-day period prior to commencement of local-into-local service, stations that have not elected carry-one, carry-all and satellite carriers could negotiate retransmission consent agreements.

Table 3. New local television stations

Date	Notice from	To	Contents
60 days prior to commencement of operation under program test authority	New local television station	All satellite carriers	• Call sign of station • Name & title of person designated to receive notifications • Address of the station and the person designated to receive notifications (if different) • Identification of the market (DMA) where the station is located • Retransmission consent/carry-one, carry-all election (request for carriage)
30 days after receipt of notice from new local television station	Satellite carrier	New local station	• Name of carrier • Name & title of person designated to receive notifications • Address of the satellite carrier and the person designated to receive notifications (if different) • Identification of the market (DMA) where service is provided • The call signs of the broadcast television stations the carrier is carrying and plans to carry in the market • The location of the carrier's designated local receive facility and, if necessary, the alternate location proposed by the satellite carrier for reception of local stations' signals • Notice to the station, if necessary, that it fails to deliver a good quality signal to the designated local receive facility of the carrier, along with the required signal strength measurement test data and test procedure information.

If the station elected carriage as a carry-one, carry-all station, then carriage would commence within 90 days after receipt of the initial notice from new local television station.

VI. Content to be carried

The Commission should apply the provisions of 614(b)(3) of the 1992 Cable Act in a straightforward manner. Section 338(g) provides for adoption of regulations that include requirements comparable to those applicable to cable operators under section 614(b)(3).[84] These requirements may apply to satellite carriers without alteration.

Section 614(B)(3) imposes two requirements on cable systems:

- The station's primary video, accompanying audio, and line 21 closed caption transmission must be carried, as must "program-related material carried in the vertical blanking interval or on subcarriers" where it is "technically feasible."[85] In determining what is "program related," the Commission generally has relied upon the factors enumerated in *WGN Continental Broadcasting Co. v. United Video, Inc.*,[86] but may consider other factors as well.[87]
- The cable system must carry the entirety of the stations' program schedule (except where carriage of specific programming is prohibited under applicable exclusivity protection rules).[88] This requirements applies to local carriage of stations electing retransmission consent, as well as those asserting rights to mandatory carriage.[89]

Satellite carriers already routinely carry the entire program schedule of local television stations, including the primary video, accompanying audio, and closed captioning on retransmitted broadcast station signals. Therefore, no reason exists to alter the application of these rules in the case of satellite carriers.

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[84]47 U.S.C. §338(g).
[85]47 U.S.C. §534(b)(3)(A).
[86]693 F. 2d 622 (7th Cir. 1982).
[87]*Broadcast Signal Carriage Issues (Reconsideration), supra*, 9 FCC Rcd at 6734.
[88]47 U.S.C. §534 (b)(3)(B).
[89]Broadcast Signal Carriage Issues (Reconsideration), supra, 9 FCC Rcd at 6745.

VII. Market definitions

The rules should allow for use of the same Nielsen data for purposes of establishing market boundaries for cable systems and satellite carriers as quickly as possible. Presently, the cable industry is required to base market definitions on the 1997-1998 Nielsen reports. It must continue to do so through 2002.[90] Satellite carriers must refer to the 1999-2000 Nielsen publications. The market definitions for cable purposes are updated triennially. The Commission should update the satellite market definitions triennially as well. And it should synchronize the Nielsen reference publication to be used by each industry. First, this is consistent with the Act's thrust towards competitive parity. Second, it would minimize consumer confusion. Third, regular updates would maintain the accuracy of the market definitions. Fourth, the effect of regular updates is likely to be minimal. Both industries now look to Nielsen DMA listings. The switch from Arbitron ADIs already has been accomplished. This involved market shifts for 135 counties.[91] Changes in the DMAs from year to year appear to involve less than 50 counties.[92] Therefore, harmonizing the market definitions for cable systems and satellite carriers makes good sense.

VIII. Duplicating Signals

Duplicating signals should be defined alike for cable systems and satellite carriers except for the definition of a network for purposes of the satellite rule. Again,

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[90] *Notice* at ¶14.

[91] *Market Definitions Reconsideration*, 14 FCC Rcd 8366, 8380 (1999).

section 338 directs application of the cable provision in a straightforward manner. Again, regulatory parity commands the same result. As under the cable rules, the satellite carrier should bear the burden of proving the program duplication that permits it to deny carriage to a local television station.[93] And two networks owned by the same parent, but offering different programming, should not be considered as the same network for purposes of the rule.[94] Again, direct application of the cable television substantial duplication rule is a sensible approach.

Sound reasons exist, however, to apply a different definition of network for purposes of the satellite rule. The definition should exclude emerging networks that provide a more minimal program schedule than the established networks. First, section 338 includes no applicable definition of network. This omission may be presumed deliberate because Congress was careful to include a definition of network in other sections of SHVIA.[95] Consequently, the Commission retains flexibility to define a network for purposes of the rule. Second, the level of duplication is relatively minimal compared to major network affiliates. Affiliates of emerging networks do not provide the substantial near full-day program schedules provided by the major networks. And the Commission has recognized that a definition based on providing 15 hours of just prime

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[92]*Id.*, 15 FCC Rcd at 8372, n.33.
[93]*Telecinco, Inc.*, 13 FCC Rcd 11158, 11161 (1998).
[94]*Paxson Boston License, Inc.*, 12 FCC Rcd 21916, 21922 (1997).
[95]*Notice* at ¶25.

time programming would be too encompassing.[96] Third, this is another instance where the impact of the provision on a local emerging-network-affiliated station excluded by the rule would be much more significant in the case of a satellite carrier. If the station is denied carriage on a cable system, it suffers loss of carriage only for that discrete group of subscribers. The station likely would continue to enjoy carriage on at least those cable systems for which it was the closer affiliate. On the other hand, if a station is denied carriage by a satellite carrier, it is denied carriage throughout the entire market. No satellite subscribers will have access to its signal, even if they live in the station's community of license. Fourth, consumers will be deprived of satellite access to their truly local affiliate. Consequently, they would be deprived of the local news, weather, sports, public affairs, and other programming of particular community interest – including severe weather warnings and other emergency information. Such a result would be an affront to congressional efforts to promote access to local signals via SHVIA.

IX. Remedies

A. Noncarriage is copyright infringement.

The Commission is correct in asserting that an outright failure to carry a station entitled to carriage under section 338 is an infringement of copyright.[97] The exclusive

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[96] *Notice of Proposed Rule Making*, MM Docket No. 92-259, 72 RR 2d 255, 261 (1993). [97] *Notice* at ¶50.

remedy is a copyright infringement suit. The act is clear and the result intended.[98] Therefore, the Commission has no jurisdiction over complaints alleging an outright denial of carriage.

B. All other matters are subject to FCC complaint process.

The Commission, again, correctly interprets section 338(f) with respect to the scope of the complaint process. Any violation of subsections (b) through (e) of section 338 is subject to the complaint process at the Commission.[99]

The rules adopted pursuant to subsection 338(g) also should be subject to the Commission's complaint process. First, whereas the statute includes no specific grant of authority to the Commission, it neither provides any other exclusive remedy, as it did with respect to non carriage, nor otherwise prohibits the Commission from entertaining complaints of violations of those rules. Second, the Commission has ample ancillary authority to fashion remedial provisions necessary to enforce the provisions of section 338 effectively.[100] Third, the Commission, unlike the courts, has the requisite technical expertise to review complaints dealing with content-to-be-carried and material degradation. Therefore, the Commission should have primary jurisdiction over

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[98] 47 U.S.C. §338(a)(2); 17 U.S.C. §501(f)(2). ALTV also observes that any retransmission of local television signals in a manner inconsistent with the Commission's rules will constitute a copyright infringement. 17 U.S.C. §122(d).

[99] *Notice* at ¶¶51-53.

[100] *United States v. Southwestern Cable Co.*, 392 U. S. 157 (1968).

complaints alleging a failure to comply with the material degradation and content-to-be carried rules adopted pursuant to section 338(g).

C. Private action is remedy for failure to pay costs of delivering good quality signal.

The Commission incorrectly questions whether a station denied carriage for failing to deliver a good quality signal to a satellite carrier should seek a remedy in court or at the Commission.[101] As noted in section III, *supra*, a satellite carrier may not refuse to carry a station that fails to provide it a good quality signal. It may only insist that the station pay the costs of providing the signal. Therefore, a failure to carry the station's signal is remediable only via a copyright infringement suit. At the same time, of course, a satellite carrier may remedy the station's failure to pay the cost of delivering the signal through a private action against the station.

X. Progress reports

Satellite carriers should advise the FCC every six months of progress towards deployment of facilities to comply with section 338 by January 1, 2002. ALTV has been deeply concerned that satellite carriers will drag their feet in deploying facilities to enable them to comply with section 338 in a timely fashion. Thus, when 2002 arrives, they will hold the public hostage in seeking delay of the January 1, 2002, compliance date. As observed at hearings on SHVIA:

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[101] *Notice* at ¶53.

> [W]hen Congress enacted the original satellite Home Viewer Act in 1988, it contemplated termination of the satellite compulsory license in 1995. However, once the public began to receive broadcast television station signals on their satellite systems, Congress essentially forfeited the ability to eliminate the compulsory license. It was extended in 1994, and no one seriously expects Congress to let it expire at the end of this year. The public simply would not stand for being deprived of signals they have received for years under the compulsory license. The same result is predictable under deferred must carry. If (we dare say "when") satellite carriers protest that compliance with must carry requirements would be impossible and threaten to withdraw all broadcast signals from their services to sidestep the must carry requirements, Congress will find itself in the same untenable position. We are dubious of the satellite industry's willingness and ability to comply with must carry rules within the near future. Therefore, we look for some assurance from them that they will be able to comply with must carry rules and will comply, that they will not come rushing back to Congress in two or three years claiming that they just have not had long enough to come into compliance.[102]

One need little imagination to envision a satellite carrier threatening to withdraw service from some markets in order to comply with the rule in other markets – all because the satellite carrier lacked diligence in deploying new facilities, knowing full well that it could create another political firestorm by threatening to withdraw service from the public.

Semi-annual progress reports would place the Commission and Congress, too, in the position to compile a record of the satellite carriers' efforts to provide local-into-local service in compliance with section 338. It would attenuate the prospect of sudden last-minute crusades to repeal or weaken section 338. It would prevent a barrage of self-serving arguments that obscure a lack of diligence on the part of a satellite carrier. It

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[102] DeVaney, *supra,* at 67.

would prevent the same sort of shenanigans that has bedeviled the legislative process since SHVA was enacted in 1988. It would allow no satellite carrier to hide its own failure to anticipate the requirements of section 338. At the same time, it would pose no appreciable burden on satellite carriers, which routinely tout their plans and accomplishments to the press, their shareholders, Wall Street analysts, and their customers.

Therefore, the Commission should require satellite carriers to file semi-annual reports detailing their plans and undertakings to achieve compliance with section 338 by January 1, 2002.

XI. Digital television

ALTV offers the preliminary view that application of the carry-one, carry-all rule to local television stations' digital signals would implement section 338 faithfully, while promoting Congress's and the Commission's goal for digital television. Again, the essence of section 338 is the avoidance of discrimination among local television stations. The carry-one, carry-all provision reflects that goal. If applied separately to digital and analog signals, it also would avoid imposing enormous new costs on satellite carriers. Only if a satellite carrier already had demonstrated its ability to carry digital signals by retransmitting a local station's digital signal in a market would the obligation to carry all stations in the market attach. Thus, proposed application of

section 338's carry-one, carry-all approach to local television stations' digital signals would promote the digital transition, but impose no new or substantial burden on satellite carriers.

Nonetheless, the Commission should not delay adoption of the analog carriage rules in order to finalize the full panoply of rules necessary to implement digital carriage requirements. Indeed, the Commission has yet to adopt cable television digital must-carry rules. Many of the issues to be resolved in that proceeding will provide the basis for resolving the same or similar issues in the satellite context. This proceeding must not stall under the pressure added by the need to address and resolve these issues. The matter of analog signal carriage is sufficiently urgent that the delay inherent in considering digital carriage issues now would be counterproductive. And the Commission still could complete final action on digital carry-one, carry-all rules well before the January 1, 2002 effective date of section 338. Therefore, the Commission might briefly defer adoption of the remainder of the digital carriage rules in order to avoid delay in this proceeding.

XII. Conclusion

ALTV urges the Commission to adopt rules as proposed herein. When all is said and done, no lax interpretation of the Act may be countenanced. The Commission must not risk eviscerating by rule what Congress has ordained by statute.

Respectfully submitted,

James J. Popham
Vice President, General Counsel

Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

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